Introduction

Montana, as many states, has had little experience making decisions concerning the location of major industrial facilities. Such a procedure is complicated for many reasons, and confusion and criticism, not surprisingly, have followed upon initial implementation of acts governing facility siting. This was the case in Montana when the hearing process for Colstrip Units 3 and 4 took 1,114 days from application to decision and resulted in the accumulation of 17,671 pages of transcript. The most often heard complaint about this proceeding focused on its delay, cost, and uncertainty.

This report contains reform considerations with respect to the Montana Major Facilities Siting Act, RCM 1947, 70-801. The purpose of the suggestions for change in the Act is to introduce increased dispatch, efficiency, and predictability in the siting process. It is anticipated that these objectives would be attained principally by modifications in the contested case format that is required by the Act. Other suggestions for reforming the regulatory framework for facility siting will be discussed within this procedural context.

Due Process Considerations

The concern of due process has been the protection of people in their persons and their property from encroachment by government without procedural safeguards. It is an often quoted maxim that "the fundamental requisite of due process of law is the opportunity to be heard.. at a meaningful time and in a meaningful manner" [Goldberg v. Kelly, 397 U.S. 254, 267 (1970)]. This has always been the interpretation of the basic requirements of due process. At a minimum, due process requires that deprivation of life, liberty, or property be preceded by notice and opportunity for a hearing appropriate to the nature of the case [Goss v. Lopez, 419 U.S. 565 (1975)]. Due process

requirements are made applicable to the federal government by the Fifth Amendment to the United States Constitution and to the states by the Fourteenth Amendment. Any changes in the facility siting procedures in Montana would have to meet constitutional requirements, as administrative agencies are bound by due process requisites in order to protect the public from arbitrary or capricious action on the agencies' part.

The commands of due process are not uniformly fixed for all situations. "Due process means that procedure which is 'due' in light of the circumstances and interests involved" [E. Gellhorn, 141]. Most importantly, as later it will become evident, due process is not synonymous with judicial process [Dixon v. Love, 431 U.S. 105 (1977)]. In the case of Matthews v. Eldridge, 424 U.S. 319 (1976), the United States Supreme Court said:

> The essence of due process is the requirement that a person in jeopardy of serious loss be given notice of the case against him and the opportunity to meet it; all that is necessary is that the procedure be tailored, in light of the decision to be made, to the capacities and circumstances of those who are to be heard to insure that they are given meaningful opportunity to present their case [348].

Types of Proceedings

Both the Montana Administrative Procedure Act [RCM 1947, 82-4201] and the Federal Administrative Procedure Act [5 U.S.C. 551] provide for different agency procedures depending upon whether the agency is implementing a general prospective rule, in which case the rulemaking or notice and written comment procedure usually applies, or whether it is adjudicating past and present

determinations of rights and liabilities based on an agency rule, in which case the trial-type or contested case procedure normally applies. Thus, there are two principal kinds of administrative proceedings. Rule-making is the appropriate procedure for resolving issues of law, policy, and discretion, and a trial-type procedure is designed for making findings on disputed facts [Davis, 270].

The contested case procedure is an adaptation of the judicial model and normally employs oral questioning and cross-examination of witnesses. A trial-type procedure may be defined as "the process by which a tribunal makes findings of fact on the basis of evidence which each party has had a chance to meet through rebuttal evidence, cross-examination, and arguments" [Davis, 270]. Facts are "past events," and it is these facts that are "elicited at trial from the testimony and evidence presented by witnesses" [Aldisert, 694, 697]. The rigor of the trial-type procedure is found in its various procedural protections and the requirement that the agency base its decision on a specified set of materials or record.

Rulemaking is the procedure of notice and written comments, designed for resolving issues of policy, law, discretion, or general fact. Rulemaking proceedings are especially suitable for inquiring into "industry practices, economic impact, scientific data, alternative choices,...about which the parties have no special information" [E. Gellhorn, 139]. Notice-and-comment rulemaking procedure especially differs from trials in that witness credibility in relating a historical fact is seldom at issue, the agency decision need not be based on a record, and the agency traditionally does not have to present a reasoned explanation of its decision.

Selecting A Procedure

Argument is increasingly heard that selection of an administrative procedure should be based on "practical procedural needs" and not on "labeling the activity as judicial or legislative" [Davis, 223]. There are several reasons for this pragmatic as opposed to formalistic approach. First,

> ...rulemaking and adjudicatory procedures are not mutually exclusive. Agencies occasionally modify each by borrowing from the other. Cross examination may be available in rulemaking; written submissions may be all that is allowed in adjudication [E. Gellhorn, 140].

The appropriate question to ask in determining the proper procedure is does due process require opportunity for a trial-type hearing or is there a sufficient interest at stake to make a trial-type hearing necessary.

Another reason for flexibility in selecting an administrative procedure rests on statutory and not constitutional grounds. If a regulatory statue prescribes the procedure, generally the above constitutional issues are not raised. Frequently, however, agency decisions legitimately can be classified as either rules (the product of a notice and written comment procedure) or orders (the product of a trial-type procedure). "Where both approaches are authorized by the particular regulatory statute and either is constitutionally permissible, the choice between them is in large part left to the agency" [Pedersen, 41] Federal courts facing this type of situation increasingly have allowed the selection of a rulemaking procedure over administrative adjudication.

Federal judges have evolved a test for determining whether a rulemaking or adjudicative procedure should be used by an administrative agency. The resulting test consists of balancing involved interests rather than focusing

on the future-oriented or past-oriented nature of the administrative activity. Reviewing the procedures of regulatory programs, the courts in various cases have weighed the "kinds of facts at issue, the sorts of rights involved, the administrative scheme at issue and what it can tolerate" [Pedersen, 42]. The following expression of the balancing test appeared in Matthews v. Eldridge, 424 U.S. 319 (1976):

> The identification of the specific dictates of due process generally requires consideration of three distinct factors: the private interest that will be affected by official action; the risk of erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and the government's interest, including the function involved and the fiscal and administrative burdens that additional or substitute requirements would entail [335].

Drawn out in this fashion, the balancing test still is little more than a general guideline and leaves much to judicial discretion [Friendly, 1278]. Since 1965, federal judges have used the flexibility permitted them under the test "to pare down any right to an adjudicatory hearing in complicated regulatory programs" [Pedersen, 42].

A Procedure for Siting Decisions

There is little doubt how federal and state statutory law presently treat siting decisions with respect to procedural requirements. The Montana Administrative Procedure Act defines "contested case" as

> ...any proceeding before an agency in which a determination of legal rights, duties or privileges of a party is required by law to be made after an opportunity for hearing. The

> term includes, but is not restricted to, rate making, price fixing and licensing [RCM 1947, 82-4202 (3)].

The contested case provisions of the Act call for reasonable notice, opportunity of all parties to respond and present evidence and argument, common law and statutory rules of evidence, cross examination, decision on the record, and a reasoned order [RCM 1947, 82-4209 to 82-4214]. The Montana Major Facility Siting Act in particular language adopts the contested case procedure for siting decisions:

> ...a record shall be made of the hearing and of all testimony taken; and the contested case procedures of the Montana Administrative Procedure Act...shall apply to the hearing, except that neither common law nor statutory rules of evidence need apply, but the board may make rules designed to exclude repetitive, redundant or irrelevant testimony [RCM 1947, 70-809 (1)].

Similarly, federal statutory law defines "adjudication" as "agency process for the formulation of an order"; "order" as "the whole or a part of a final disposition,...including licensing"; and "license" as "the whole or a part of an agency permit, certificate, approval..." (5 U.S.C. 551 (6), (7), and (8)].

National commentators have been especially critical of using trial-type procedures in administrative activities similar to facility siting. In 1962, Walter Gellhorn wrote:

> In a very real sense, some of the country's gravest administrative deficiencies stem from lawyer-induced over-reliance on courtroom methods to cope with problems for which they are unsuited. Is it not absurd, for instance,

> to use the technique of the tort trial to determine . whether locating a nuclear energy power plant near Detroit will or will not be in the public interest? In conventional litigation an effort is made to reconstruct a specific, nonrecurring past event. In the administrative [case] just instanced a specialized judgment is to be made not about what has already occurred but about future possibilities--"the field of uncertainties, imponderables and estimates" [W. Gellhorn, 243].

Circuit Judge Harold Leventhal has written that business regulation is an "issue involving expert opinions and forecasts, which cannot be decisively resolved by testimony. It is the kind of issue where a month of experience will be worth a year of hearings" [American Airlines v. CAB, 359 F. 2d 624, 633 (1966)]. Another respected federal judge, Henry Friendly, has made a similar observation:

> I think the agencies have gone overboard in their zeal for a record that will drain the last dregs from the cask....The form of judicial procedures has created an illusion of the possibility of achieving certainty.... When the issue is whether John killed Mary, or even whether John promised Mary to marry, a fair degree of certainty ought usually to be attainable and no effort should be spared in the attempt to attain it. Some administrative proceedings may present issues of this sort, e.g., revocation of an airline pilot's license or certain unfair labor practice cases But it simply is not possible for anyone to predict with complete accuracy the

> flow of air travel between two continents several years hence. . .The agencies should do more to limit the time-consuming efforts of the parties and the agency staffs to obtain the appearance of exactness when appearance is all there is" [Friendly, Benchmarks, 72].

The effects of inappropriate application of trial-type proceedings are well documented: delay, unnecessary expense, intimidation of expert witnesses, a voluminous and largely irrelevant record, and a resulting "bargaining chip and a source of pressure for more lenient regulation" [Pedersen, 44]. Judge Friendly wrote of such a consequence:

> The agency hearing transcript comprised more than 32,000 pages and the material sent us, consisting of selected portions of the record, filled three feet of shelf space. The use of trial-type procedures had been of little avail; cross-examination of government witnesses, which filled some 60 per cent of the pages devoted to the Government's presentation, yielded precious few admissions of other statements of any significance [Friendly, 1306].

The Montana experience with the Colstrip Units 3 and 4 proceedings is quite similar. The hearings before the Boards of Health and Environmental Sciences and of Natural Resources and Conservation accumulated a combined record in excess of 17,000 pages. The Board of Health and Environmental Sciences heard fifty-three witnesses and received a total of 289 proposed findings of fact and 20 proposed conclusions of law. The Board of Natural Resources and Conservation ordered a discovery rule and approximately 10,000 pages of depositions were taken. Of these, less than 300 pages were eventually

included in the hearing record. The hearing of the Board of Natural Resources and Conservation consisted of 255 witnesses, six hours of cross-examination for each side per witness, 1573 proposed findings of fact, and 19 proposed conclusions of law [Graybill, 475-481]. The members of Montana's two lay regulatory boards found themselves overwhelmed with a massive and undifferented record and forced to make what was "probably an intuitive judgment" [Graybill, 492].

As the inappropriateness of trial-type procedures for hearings on abstruse subjects became evident, courts and commentators searched for an alternative method of protecting individual rights without unduly burdening the agency involved. A procedure now called a "paper hearing" [Stewart, 731] was developed by the District of Columbia Circuit Court in a number of cases concerning the Environmental Protection Agency (EPA). This new procedural model is said to combine "many of the advantages of a trial-type adversary process (excepting oral testimony and cross-examination) while avoiding undue delay and cost" [Stewart, 731]. The basic idea is that the controversy is reduced to "verified written statements which are then exchanged by the parties for the purpose of rebuttal" [E. Gellhorn, 202].

The first case to improvise procedure for the EPA was Kennecott Copper Corp v. EPA, 462 F.2d 846 (D.C. Cir. 1972), in which the matter was remanded to the EPA with instructions to supply an implementing statement to enlighten the court as to the basis on which the EPA had reached its decision. In International Harvester Corp. v. Ruckelhaus, 478 F.2d 615 (D.C. Cir. 1973), the court said that parties had only a qualified right to cross-examine witnesses and that denial of the right was not deprivation of a meaningful opportunity to be heard. The court also said that the agency should provide the parties with an opportunity to address themselves to matters not previously put before

them for comment. In Portland Cement Association v. Ruckelhaus, 486 F 2d 375 (D.C. Cir. 1973), the court required the EPA to grant the opposing parties access to the method used by the agency to reach its decision, permitting it to be subjected to meaningful criticism. The EPA also was required to respond in its decision to criticisms and contrary evidence contained in the comments of the parties opposing the EPA's proposed action. In Ethyl Corp. v. EPA, 541 F.2d 1 (D.C. Cir. 1976), the EPA followed these procedures and the court said that the procedure was above the requirements of due process.

In the "paper hearing" procedure that emerged from these cases, the agency is required to disclose for public comment both the essential factual data on which its anticipated action is based and the method used in reasoning from its data to the proposed decision. This notice also must contain the major legal interpretations and policy considerations underlying the proposed action. The significant written comments received during the public comment period must be answered at the time of the announcement of the final decision. The comments are required to meet the standard of detail required of the agency in announcing its decision before they will be considered significant. Additionally, the agency could keep the record open for 30 days to provide for the submission of rebuttal and supplementary information instead of allowing cross-examination during the hearing [Harvard Environmental Law Review, 98]. The hearing also must provide an opportunity for the oral presentation of data, views, or arguments of interested persons to supplement the written comments. Only the objections raised with some specificity during the public comment and hearing period, and to which the agency thus has been required to respond, may be raised on judicial review.

The "paper hearing" procedure requires that a docket be established for each proceeding. All relevant documents must be placed in the file, along with the written comments received and all transcripts of oral presentations. All important issues raised in written comments, hearing transcripts, and relevant documents must be discussed in a reasoned statement accompanying the final decision or in an attached technical support document. The final decision with the support document closes the file, and the completed file becomes the exclusive record for judicial review. The reviewing court must then determine whether the agency has taken a "hard look" at the relevant evidence and made a reasoned exercise of its discretion in the particular circumstances. Because it seems inevitable that the losing party will seek judicial review of a facility siting decision, some writers think that a flexible process such as "paper hearing" would best insure that an acceptable record was available for review [Robinson, 538].

The development of the "paper hearing" seems to be a solution to the problem of uncertainty, delay, and cost in the administrative procedure. It permits affected interests to scrutinize the bases for proposed agency action and to submit information and argument in response. It permits the reviewing court to examine the evidence and analysis that both supports and challenges the agency's action. Agency decision making should be of high quality because the agency must reveal "the factual and methodological bases for its decision and face judicial review on a record that encompasses the contentions and evidence of the agency and its opponents, including responses by the agency to criticisms of its decisions" [Stewart, 731-732]. The "paper hearing" seems to be well suited to resolving complex and difficult issues where trial-type procedures would cripple administrative action and traditional

rulemaking procedures would not provide adequate protection of affected interests. "The development of 'paper hearing' procedures at other agencies, and proposals by commentators, legislators, and the Administrative Conference indicate that the 'paper hearing' model may well be widely imitated and eventually accepted as a procedural tertium quid" [Stewart, 733].

Commentators have suggested other procedural innovations which have included pre-hearing procedures. A pre-hearing conference would allow parties to clarify issues and stipulate to agreements on certain matters [Van Dusen, 422]. A special study committee of the American Bar Association concluded the following concerning pre-hearing conferences in industrial site selection proceedings:

> Because of the potential for complexity in the factual and legal issues which might be raised, it is believed that pre-hearing conferences...should be held to identify the issues that are actually in dispute. It would also seem to be advisable for the ISC [Industrial Siting Council] to set a date at the preliminary pre-hearing conference for the completion of discovery, at which time a final pre-hearing conference would be held....The final pre-hearing conference should result in a pre-hearing order which would govern the proceedings of the hearing [American Bar Association, 72-73].

A related suggestion is to require a high threshold showing in certain areas at the pre-hearing conference before a party would be allowed to inquire into some issues on the merits [Boyer, 169]. The expectation is, however, that the hearing would consist of an exchange of written arguments unless the hearing officer ruled that oral argument and cross-examination were required

for due process. Other possible pre-hearing procedures are requiring the submittal of direct evidence in written form with the application [Ramey and Murray, 26] and noticing by the hearing officer of facts that are not critical to the controversy with an opportunity for rebuttal by the adversely affected party [Clagett, 80].

Due Process and the "Paper Hearing"

There appears to be good reason to believe that use of a "paper hearing" for certifying industrial facility sites would meet due process requirements. Judge Friendly has written: ".. common sense dictates that we must do with less than full trial-type hearings even on what are clearly adjudicative issues" [Friendly, 1268]. His resolution of the administrative impasse is a hearing "had on written materials only" [Friendly, 1270]. The United States Supreme Court upheld conditioning of the right to an adjudicatory hearing upon a threshold showing that substantial factual questions will be raised [Weinberger v. Hynson, Wescott and Dunning, Inc., 412 U.S. 609 (1973)] and later demonstrated approval of considerably less than a trial-type hearing for determining adjudication facts when circumstances permitted doing so [Arnett v. Kennedy, 416 U.S. 134 (1974)].

The critical issue appears to be whether adjudicative facts or legislative facts are involved in industrial facility siting proceedings.

> Adjudicative facts usually answer the questions of who did what, where, when, how, why, with what motive or intent; adjudicative facts are roughly the kind of facts that go to a jury in a jury case. Legislative facts do not usually concern the immediate parties but are general facts which help the tribunal decide questions of law and policy and descretion [Davis, 276].

Judge Leventhal's analysis leads to the judgment that site regulation does not deal with adjudicative facts because it concerns issues "involving expert opinions and forecasts, which cannot be decisively resolved by testimony" [American Airlines v. CAB, 279]. Professor Davis' formulation of the basic due process principle then would be conclusive: a party with a sufficient interest or right at stake in a determination of governmental action should be entitled to know and to meet, with the weapons of rebuttal evidence, cross-examination, and argument, unfavorable evidence of adjudicative facts; a party with a vital right at stake may be properly denied such procedural protections on issues of law, policy, or legislative facts [Davis, 285]. The underlying rationale is that cross-examination only makes good sense when it is instrumental in discovering the truth. If the demeanor and credibility or veracity of a witness are not an issue, cross-examination is not required as long as some form of rebuttal is provided [E. Gellhorn, 207]. The exchange of verified written statements "can result in greater precision than where the facts are presented orally" [E. Gellhorn, 202].

Judge Friendly offers another rationale for concluding that the "paper hearing" procedure would meet due process requirements. His balancing approach is based on examination of the precise nature of the governmental function involved and on a ranking of the elements of a fair hearing. A distinction is drawn between a proceeding in which a governmental agency seeks to act against a citizen and one in which it only is refusing a citizen's request. For example, "revocation of a license is far more serious than denial of an application for one" [Friendly, 1296]. Judge Friendly writes that court decisions generally have conformed to the following analytical scheme:

> As we go down the second list from the more severe actions to the less, the needle would point to fewer and fewer requirements on the list of required safeguards....I suggest also that the elements of a fair hearing should not be considered separately; if an agency chooses to go further than is constitutionally demanded with respect to one item, this may afford good reason for diminishing or even eliminating another [Friendly, 1279].

The elements of a fair hearing listed by Judge Friendly include: an unbiased tribunal; notice of the proposed action and the grounds asserted for it; an opportunity to present reasons why the proposed action should not be taken; right to call witnesses; right to know the evidence against one; right to have decision based only on the evidence presented; right to counsel; the making of a record; statement of reasons; public attendance; and judicial review [Friendly, 1279-1295]. Substitution of a "paper hearing" for an oral hearing, in Friendly's analysis, "should depend on the susceptibility of the particular subject matter to written presentation, on the ability of the complainant to understand the case against him and to present his arguments effectively in written form, and on the administrative costs" [Friendly, 1281]. He also questions the applicability of compulsory process and confrontation in regulatory proceedings concerning involved scientific and economic subjects [Friendly, 1285]. Most importantly, Friendly says a written statement of reasons is "almost essential if there is to be judicial review," and he "would put this item close to the top rather than near the bottom of the scale" [Friendly, 1292]. Because the "paper hearing" procedure places

special emphasis on access to records, written presentations, criticism and response, and reasoned opinions, it appears to be a sound experimentation that is well within the flexible boundaries of the due process clause.

Coordination of State Agencies

The process of siting energy facilities, when approached in the abstract and rationalistic fashion of the planner, is an involved but interrelated series of separate and definable steps [Richetto, 31]. A commonly held conclusion about the siting process for the Colstrip plants was that the proceedings were not sufficiently thought-through and coordinated. A case study of this experience attributed much of the regulatory difficulty to "administrative novelty and inexperience" [Graybill, 487] and observed that the proceeding "suffered from a confusion of issues" [Graybill, 489]. Much of this confusion and uncertainty could be dissipated through sharper definition in the Major Facilty Siting Act of the stages in the siting process, the functions to be performed at each stage by the properly authorized agencies, and the sequence or coordination of agency involvement.

Many students of facility siting have concluded that identification of potential facilty sites is an essential preliminary phase of the process. A special study committee of the American Bar Association recommended that "preliminary site qualification or identification should occur prior to the time that the industrial applicant files an application for a permit to construct a facility at a particular site" [American Bar Association, 62]. The advantage that would accrue to the applicant would be reduction of uncertainty and risk, and the regulatory agency's gain would be increased time for gathering threshold data for use in the siting decision. There is widespread acknowledgement that forecasting techniques can be used to label

locations in advance as suitable or wanting for consideration for facility sites [Kuntz, 73]. Lacking such a statewide natural resources plan, Montana regulatory agencies inappropriately were forced to consider broad policy matters in the ad hoc Colstrip proceeding. The siting process should be used to pass upon a specific facility design for a specific site, and the improper conversion of the process for broader policy formulation should be avoided in the future.

Montana faces a problem because there is little likelihood any time soon of the state completing a siting inventory. How then should undue risk and uncertainty for the applicant be minimized and sufficient lead time be provided the agencies for collecting preliminary information? A two-step process which separates specific site selection from consideration of the environmental compatibility of the planned facility at that site is one possibility. This approach, however, seems to be both illogical and duplicative. Another model is a two-step process consisting of a) determination of need and b) review of the facility design and determination of that facility's environmental compatibility with a specific site. In the absence of a statewide siting inventory, it seems unreasonable to separate selection of a specific site from consideration of the environmental impact of a given facility design. The applicant would have the responsibility of suggesting a specific facility design for a specific site and defending the specific plan's compatibility with the desired location. The second step of the siting process thus would be tied to the single site. The applicant would have the additional responsibility of listing other sites that were studied and detailed reasons for their rejection. The risk to the applicant would be moderated by clear decisional standards, fair and efficient procedure, and a reasonable timetable.

The need of alerting regulatory agencies as to the applicant's proposed location could be met by an early warning. At least by the time of the initiation of the first step in the siting process, the applicant should be required to inform appropriate agencies of the site to be proposed in the application.

The first step of the siting process, determination of need for the energy facility, should be carried out by the Montana Public Service Commission, even though several state agencies are likely candidates for this responsibility. The choice should turn on which agency would make the best ongoing use of the forecasting capacity necessary for determining future energy demand. This specialized and expensive skill should not be allowed to lie fallow or to be thinly distributed among agencies.

Forecasting energy demand is an essential part of ratemaking that is not within the present capability of the Public Service Commission. Recognized ratemaking experts have developed models to allow use of future test-year considerations in price setting. The main idea is that effective regulation requires accurate forecasting of the relationship between allowed rates, energy consumption, and revenue requirements. The more progressive utility regulatory bodies at the federal level and in other states have the proper personnel to implement these models. Montana's deficiency is especially critical because the state's major utilities are now developing respectable forecasting departments. The Montana Public Service Commission would benefit from a forecasting staff on a regular and consistent basis as well as have this developed resource available for determining need for siting purposes.

Under existing Montana law, the second or critical decision phase of a two-step siting process necessarily would involve both the Board of Natural Resources and Conservation (BNRC) and the Board of Health and Environmental

Sciences (BHES). The Major Facilities Siting Act in effect would require two steps within the second phase of the larger process "[b]ecause the Department of Health can veto any proposed facility which would not comply with Montana's tough air and water quality laws" [Graybill, 464].

The Act should be amended to clear up the confusion concerning the relative roles of the two boards at this stage of the siting process. As a first step, a single hearing officer using a "paper hearing" procedure should build a common record for the decisions of the two boards. The same record would be certified first to BHES and then to BNRC for their action. The record in each instance would be accompanied by proposed findings of fact, conclusions of law, and decision. BNRC's responsibilities would become effective only if BHES certified compliance with state and federal standards and plans concerning air and water quality. Accordingly, judicial review would be available at the rendering of an adverse decision by BHES and after BNRC's final decision, but only at the instance of a party who had entered into the proceeding with sufficient detail [see Northern Plains Resource Council and Northern Cheyenne Tribe, Inc. v. Board of Natural Resources and Conservation for the State of Montana, et al., No. 40462 (Dist. Ct , Lewis and Clark County), March 3, 1978, for review proceedings under present law]. Further clarification in the Act seems necessary with respect to BNRC's additional and separate treatment of air and water quality considerations. The Act should specify that BNRC has no role to play subsequent to a BHES determination of noncompliance and that BNRC's decision making in the event of a BHES finding of compliance consists of weighing the many decisional standards (including air and water quality thresholds) in evaluating the likelihood of minimum environmental damage.

The balancing decision presently required of BNRC is so complex that it invites disbelief. The Act

> ...specifies a list of fifty-six environmental factors to be considered in...deciding applications for certificates. Section 70-810 (1) requires that the Board, in passing on a particular application, not only balance these fifty-six factors, but also explore and make findings on seven major conceptual approaches to the siting decision [Graybill, 467].

The expectations of the drafters are impossibly beyond human capacity. Simply said, because it can be conceived does not mean it can be done. The Act, as it now stands, invites unbridled administrative discretion because of its absence of guidance with respect to ranking the many considerations. The absence of a definitive and authoritative state energy policy worsens the situation of the Board. Rather than "channel[ing] the decision-making process to an extraordinary degree" [Graybill, 467] the law underwrites administrative whim in one of the most important areas of state policy. The recommendation of the American Bar Association study group should be followed: the siting agency "should be guided by legislative criteria in reaching its balancing decision. These criteria should define the public interest, and identify the values to be considered and their relative priority" [American Bar Association, 2].

The Preemption Question

Under the doctrine of federal preemption, the United States Congress could at any time assume full authority over siting energy facilities. Federal control of hydroelectric power plant siting and licensing is a precedent [Federal Power Commission v. Union Electric Co., 381 U.S. 90 (1965)]. The desirability of preempting siting authority over other kinds of energy facilities

has been considered by the President, Congress, and special study groups. The principal motivation for such a move would be high "risk that federal-state regulatory conflicts will evolve into intractable standoffs--with crippling effects on the nation's economy and security" [Federal Energy Regulation Study Team, 19].

The doctrine of federal preemption is firmly established. The Supremacy Clause of the United States Constitution (Article VI, Section 2) states that the Constitution and laws of Congress shall be the supreme law of the land. Conflicts between state and federal law must be resolved in favor of the federal regulation. This doctrine of supremacy has been applied by the courts since the cases of McCulloch v. Maryland, 17 U.S. 316 (1819), and Gibbons v. Ogden, 22 U.S. 1 (1824). The controlling federal regulation may arise under one of the legislative powers enumerated in the Constitution or under Congress' general constitutional powers to tax and spend for the general welfare and to enact laws "necessary and proper" to carry out its specific grants of authority.

Courts have applied the preemption doctrine to strike down state regulations in several types of instances. Where state law conflicts with federal law and compliance with both is a physical impossibility, federal law clearly controls [Bibb v. Navajo Freight Lines, Inc., 359 U.S. 520 (1959)]. State law also may be preempted where the pervasiveness of federal regulations is so complete as to make clear that the federal government is "occupying the field." State regulation of a federally occupied field is superseded whether or not it interferes in any way with the operation of the federal statute [Hines v. Davidowitz, 312 U.S. 52 (1941)]. A third basis for federal premption is a court's inference of a Congressional intent to preempt a regulatory area [Northern States Power

Co v. Minnesota, 447 F.2d 1143 (8th Cir. 1971) affirmed at 405 U.S. 1035 (1972)] The inference generally is drawn from a statute's legislative history or the nature of the subject matter, for example whether or not the area demands uniform regulation.

Much of Congress' broad regulatory power is derived from the Commerce Clause of the United States Constitution, Article I, Section 8, Clause 3. State regulation of facility sites is within the traditional police power reserved to the states, i.e., authority to protect the health, safety, and welfare of the citizens of the state. A state's regulation of activities wholly within its jurisdiction can be preempted by Congress because of the regulations substantial effect on interstate commerce [NLRB v. Jones and Laughlin Steel Corp., 301 U.S. 1 (1937)]. Site regulation of power plant facilities clearly can affect interstate commerce if the electricity to be generated is destined for consumers in other states. Congress thus has ample authority to seize exclusive control of siting all or some energy facilities [Wickard v. Filburn, 317 U.S. 111 (1942)]. The United States Supreme Court has said, however, that it will not lightly presume federal preemption when Congress enters "a field which the States have traditionally occupied" [Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)]. The Burger Court seems to be functioning under the basic notion that if Congress desires to displace state regulation of a subject matter, that intention should be made "clear and manifest" in the legislation [City of Burbank v. Lockheed Air Terminal, Inc , 411 U.S. 624 (1973); U.S. v. Chandler, 410 U.S. 257 (1973)].

Pressure is building in the nation for an alternative to the present state scheme of site regulation, but federal preemption generally is conceded to be the most drastic option. This hesitation stems from recognition of the

states' legitimate authority over land use and their accumulated experience in this area of regulation. The study committee of the American Bar Association fully appreciated this local interest:

> The Committee recognizes...that any national allocation of mandatory industrial sites to the States might raise constitutional questions of sovereign jurisdiction, and assumes that any such programs would be limited to those situations where a genuine national interest truly compels national involvement. Land use decisions are, in the first instance, properly local decisions; and, just as local regulations should only be preempted by the state when there is critical state concern, state and local controls over land use should be subjected to national supremacy only when a critical national concern so requires and when there is a constitutional basis for doing so [American Bar Association, 39].

The Federal Energy Regulation Study Team came to a similar conclusion about the essentially local nature of land use decisions:

> Historically, state and local governments have been responsible for regulating land use within their jurisdictions. This includes siting as well as other aspects of energy facilities. The body of expertise and familiarity with siting matters unique to individual localities would be difficult, if not impossible, to recreate at the federal level [Federal Energy Regulation Study Team, 34].

Recognition that local residents have the greatest stake in land use decisions does not rest the preemption matter, however. Decisions made below the federal level are frequently predicated on localized concerns that may ignore interests of regional or national importance. The problem arises with large energy facilities which may serve several states:

> these larger facilities are encountering increased resistance from state and local officials who realize that while the benefits of such a facility are enjoyed throughout widespread areas, the adverse effects (environmental and otherwise) are borne almost exclusively by those living near the facility... [Federal Energy Regulation Study Team, 19].

The resulting issue of conflicting state and national interests has been called "the most difficult to resolve in the entire regulatory picture" [Federal Energy Regulation Study Team, 35]. The principal alternative less extreme than preemption for resolving this standoff is some form of federal-state cooperation and coordination. Even this approach presumes a strong federal presence with respect to educating state officials about national energy needs, reviewing proposed energy facilities in the states, assuring that state timetables satisfy national energy needs, and assisting states to locate satisfactory sites [Federal Energy Regulation Study Team, 34-35]. Whether the federal government chooses coordination or preemption, the states in the future will face expanded federal responsibility for preventing unnecessary delays in energy plants deemed vital to national energy sufficiency.

How, then, can a state with critical interests to protect divert an increasingly activist federal government from the preemption path? If there is a workable solution, its foundations must be the principal substantive and procedural

features of the state's siting policy. Procedural reforms to reduce risk, uncertainty, and delay already have been discussed above. The chief reform strategy in state substantive siting policy should be avoidance of narrow localism. Any blanket prohibition that frustrates realization of regional and national energy objectives will be immediately suspect and inevitably will fuel the fires for preemption.

In this regard Montana should reject any definition of "need" for the proposed energy facility that focuses solely on state consumption. When a proposed facility would serve a multistate area, need must be considered on the applicant's terms. It is inevitable that courts on judicial review will apply a balancing test with respect to local concerns and regional or national interests [Huron Portland Cement Co. v. Detroit, 362 U.S. 440 (1960)]. Agency decisions, as those of courts, can turn down out-of-state requests for facility sites in Montana only by a carefully reasoned balancing argument. Site requests for serving only instate needs, of course, do not raise such problems.

This concern of protecting a legitimate area of state public policy would be moot if Congress had passed the Energy Facilities Planning and Development Act, S. 619, 94th Cong. 1st Sess. (1975), which contained an express provision preempting state siting law. Because Montana could not have resisted this explicit preemption by Congress if it had occurred, its attention should be directed at developing a regulatory framework for facility siting which does not unduly frustrate or delay reasonable attempts to develop energy resources. Federal preemption will be much less a possibility when the state is making siting decisions as rationally and responsibly as the Federal government could expect of itself.

Conclusion

It is appropriate that Montana public officials now reflect on the adequacy of the state's Major Facilities Siting Act. The administrative and judicial experience with the application to construct Colstrip Units 3 and 4 leads to the conclusion that reform considerations are in order. In the siting regulatory process, delay should be replaced with dispatch, waste with efficiency, and uncertainty with predictability. Two types of reforms are necessary to accomplish these goals: changes in the regulatory procedures of the siting process and alterations in several key substantive features of the siting act.

Any procedural reforms will have to meet the test of due process. Due process standards are flexible, however, and they do not require blind adherence to the judicial model. Federal courts have developed a new type of proceeding termed a "paper hearing," and prestigious national commentators have called for its application to regulatory activities with the characteristics of facility siting. The "paper hearing" essentially reduces a controversy to an exchange of written statements. The result is greater regulatory precision in complicated matters than can be attained by the contested case format now required by Montana law.

More effective coordination between involved state agencies is another deserving procedural reform. Montana's siting act should be amended to specify a two-step regulatory process consisting of determination of need and certification of a specific facilty design for a specific location. The Public Service Commission should pass on need; the Boards of Natural Resources and Conservation and Health and Environmental Sciences acting in terms of clearly delineated sequence and roles should determine the merits of the application. The act as it now stands can greatly benefit from hindsight.

There are two substantive changes in the siting act that warrant serious consideration. First, the Montana Legislature as the governing body of the state should resolve the confusion created by the mass of undifferentiated siting criteria. Administrative discretion in the hands of a part-time, appointed lay board is not a satisfactory alternative for making critical policy. The legislature next should specify directly in the Act that "need" for the facility will be resolved on the applicant's terms. Ambiguity here will threaten loss of the state's traditional control over use of its own land.

It has become evident that energy and environmental policy is not a parochial concern. Montana must keep fully aware of federal and multistate interests. Administrative coordination must have both a federal and an intrastate dimension. If Montana does not make adjustments in its siting policy to meet inevitable national and regional criticism, the possibility of complete federal preemption of site regulation will loom increasingly large. The law and the politics of the situation make this clear.

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APPENDIX A

Colstrip Units 3 and 4: Chronology of Siting Process

Date	Event
10/30/72	A report indicates the Montana Power Co. (MPC) is studying the feasibility of constructing 2 more coal fired generating plants at Colstrip, Montana.
11/16/72	The Billings Gazette has called for a halt to construction at Colstrip saying completion of generating units 1 & 2 would beget other generating plants. The Gazette wants the electricity produced at load centers not in Montana.
12/6/72	MPC has warned that electrical consumers in the state face power shortages if MPC is not allowed to build its plants at Colstrip.
2/22/73	MPC is considering the feasibility of constructing two 700 megawatt coal-fired electric generating plants at Colstrip.
2/23/73	MPC has confirmed reports that it is planning to build additional generating plants at Colstrip.
4/28/73	Montana's Environmental Quality Council took a firm stand behind Montana's new power plant siting Act (Utility Siting Act passed March 5, 1973, RCM 70-800). The Council said the new act must cover the two new proposed plants at Colstrip.
4/29/73	Montana's Environmental Quality Council has authorized its executive officer, Fletcher E. Newby, to oppose any waiver of the statutory study period in connection with the granting of siting permits for the two new proposed generating units at Colstrip (Colstrip 3 & 4). The 1973 Utility Siting Act provides up to 600 days for in-depth studies of the consequences of locating a plant in a particular area. The Department of Natural Resources and Conservation (DNRC) is charged with administering the Act and is allowed under the act to waive the study period.
5/5/73	MPC has announced plans to construct Colstrip 3 & 4. It would do so in partnership with Puget Sound Power and Light Co., Portland General Electric Co., and Washington Water Power Co.. Assuming that Montana approves the projects construction would begin in 1974 and would be completed in 1978 and 1979. The power consortium has asked Montana for some sort of assurance prior to paying the $1.3 million filing fee required under the Utility Siting Act that they have some realistic chance for a go ahead on the two new plants at Colstrip. Governor Tom Judge and other state officials said such assurance would be impossible at least on the basis of present

Date	Event
	information
5/12/73	Governor Tom Judge vowed to give top evaluating priority but no time-cutting commitment to plans by N.W. utilities to build Colstrip 3 & 4. He said under a week old policy the Board of Natural Resources (BNR) cannot consider a time waiver, "until an analysis and recommendation consistent with the law has been prepared by DNRC."
6/6/73	MPC and 4 other N.W. utilities, Puget Sound Power and Light Co., Portland General Electric Co., Washington Water Power Co., and Pacific Power and Light Co. have applied to DNRC for permission to build Colstrip 3 & 4. The utilities sent the $1.2 million filing fee which is to be used to fund state analysis of the proposed construction. The application was filed under the 1973 Utility Siting Act, giving the BNR the power to approve or reject the plan.
6/19/73	MPC consortium has filed suit in District Court in Helena asking for clarification of the Montana Utility Siting Act. They have asked the court to declare as one project the two proposed generating plants and a supporting transmission line system running from Colstrip to Hot Springs, Montana. Montana and the DNRC ruled on June 15, 1973 that the generation and transmission facilities are separate projects requiring individual consideration by the state. At issue in the declaratory judgment action with DNRC and Director, Gary J. Wicks, as defendants is the amount of filing fees to be paid by the consortium.
9/27/73	At Big Sky Resort, State and Federal officials from 20 agencies were given a sneak preview of a $1.5 million study funded by the MPC consortium and conducted by the Westinghouse Environmental Systems Department (WESD) on the environmental impact of Colstrip 3 and 4. The study which paints a "rosy" picture will be used by the consortium to buttress its case in its application for permits to build Colstrip 3 and 4.
3/19/74	The Montana Stockgrowers Association recommends that proposed generating plants be located at "powerload centers" and not at Colstrip or anywhere in Eastern Montana.
3/21/74	The Bureau of Land Management (BLM) has been designated lead agency in a study by the Department of the Interior for the required Environmental Impact Statement on Colstrip 3 and 4. Federal involvement was triggered by MPC's request for a transmission line from Colstrip to Hot Springs. The agencies to be involved are the Office of Environmental

Date	Event
	Project Review, U.S. Geological Survey, BLM, Bureau of Indian Affairs, The U.S. Forest Service, Bonneville Power Administration, Solicitor's Office, Bureau of Reclamation, and the National Park Service.
4/1/74	It has been disclosed that Montana Governor, Tom Judge, has sent a letter to the Secretary of the U.S. Interior Department, telling it firmly but politely to keep its hands out of the state's decision on construction of Colstrip 3 and 4. The letter said unless the Interior Department's designated lead agency, the BLM, relies heavily on work completed by Montana's DNRC, it is doubtful if an adequate report on environmental impact can be done by the BLM. The DNRC will publish its first formal report July 1, 1974.
5/1/74	BLM announced today that the Federal government's Environmental Impact Statement will be due in draft form November 1, 1974.
6/20/74	State and Federal officials have announced that they will sign an agreement to produce a single comprehensive statement on the environmental effects of Colstrip 3 and 4. The state's DNRC study will be tied to one being conducted by the BLM for the Interior Department. All reports will be due by August 15, 1974. The DNRC, currently conducting a 600 day study, has until January 31, 1975 to advise the BNR on alternative actions.
6/21/74	Federal and State officials called off a plan tying the DNRC study to one being conducted by the BLM. The action was triggered by a statement by Albert C. Tsao, Administrator of the Energy Planning Division of the DNRC, that a study by Westinghouse Environmental Systems, funded by MPC, would be little included in the state or federal impact study.
8/3/74	Researchers are completing their studies for DNRC's Environmental Impact Statement. Reports are due August 15, 1974. The draft document combining reports and results of other studies will be finished in November. The DNRC, conducting the study of Colstrip 3 and 4, has until January 31, 1975 to advise the BNR on alternative actions.
8/10/74	DNRC has released a list of its contracted studies for its Environmental Impact Statement on Colstrip 3 and 4. The list includes: 1) $200,000 to study air pollution levels by the Department of Health (DH), 2) $66,000 to study radioactivity levels and whether they will increase by DH, 3) $14,000 for a DH study of existing and potential water pollution problems, 4) $32,000 for a study by the Department of Intergovernmental Relations of the impact on taxes, government services, the capacity of government to issue

Date	Event
	bonds for the construction of schools, business activity, and how to avoid adverse effects, 5) $37,000 for two studies on social effects of industrialization on agricultural Eastern Montana. The Department of Social and Rehabilitation Services is editing the report based on investigations by the University of Montana and Montana State University, 6) $35,000 to study the impact of pollution on vegetation by the University of Montana, 7) $89,000 for two studies by the Department of Fish and Game to determine the impact of the plant and power lines on waterfowl and aquatic life, wildlife, and game ranges, 8) $50,000 for two studies by Battelle Laboratories and Hazra Consulting Engineers to determine feasible engineering alternatives to proposed transmission line design and analyze proposed air pollution control systems.
8/19/74	The BLM may have final say on construction of Colstrip 3 and 4 since it must decide on a coal-lease application by Western Energy Company, a wholly owned subsidiary of MPC, which if denied could cause the whole Colstrip 3 and 4 project to be scrapped.
8/20/74	Four state agencies have refused to make public copies of their impact reports on Colstrip 3 and 4 due to contracts with the DNRC. The reports by the DH, Department of Intergovernmental Relations, Department of Fish and Game, and Department of Social and Rehabilitation Services will be kept secret until combined into a single draft Environmental Impact Statement about November 1, 1974.
9/9/74	"Secret" state DH studies leaked to the Great Falls Tribune show no significant damage from proposed Colstrip 3 and 4 plants. The studies have been turned over to the DNRC which has refused to release the studies while preparing its draft Environmental Impact Statement to be released November 1, 1974. The projects must be approved by the BNR. The DNRC has until January 31, 1975 to advise the BNR on its decision.
9/10/74	The leaked DH study shows that there may be a slight decline in the quality of water in the Yellowstone River due to Colstrip 3 and 4.
9/10/74	State DH studies given to DNRC say preliminary analysis performed to date indicates that the Air Quality Bureau can certify that the proposed Colstrip 3 and 4 facility would be capable of meeting both state and federal ambient air and emission standards. The studies also indicate that water pollution would not be a serious problem.
9/13/74	The BNR has backed the DNRC policy of temporary secrecy

Date	Event
	of Colstrip 3 and 4 impact reports made by 11 state agencies The BNR said the reports would be available as soon as DNRC issues its draft Environmental Impact Statement.
9/23/74	The Northern Plains Resource Council (NPRC) an environmental group opposed to the construction of Colstrip 3 and 4, has attacked as unfair the MPC consortiums's plan to spend $100,000 on advertising promoting construction of Colstrip 3 and 4 NPRC said it depends on donations for its survival and is counting on Montana's sense of fair play to see their side of the issue.
9/30/74	The MPC and the Department of Fish and Game have agreed to end their advertising and media campaigns on the construction of Colstrip 3 and 4 as long as the other side complies. MPC has also asked that state studies of public opinion on Colstrip 3 and 4 be kept secret.
10/23/74	The Rosebud Protective Association announced Wednesday that it will file suit against MPC and its partners if air pollution from the Colstrip generating plants causes any crop damage in Rosebud County. The Association, an affiliate of NPRC, adamantly opposes Colstrip 3 and 4.
11/21/74	MPC is trying to use retired employees to create a political climate favorable to their project to construct Colstrip 3 and 4. MPC sent a letter asking the retirees to help MPC get approval from the BNR for Colstrip 3 and 4. The retirees have been asked to circulate petitions supporting the project, write letters to the governor, the BNR director, Board members, and to ask friends and acquaintances to do the same, and to encourage service clubs and associations to do the same.
12/3/74	The DNRC has hired the Oregon law firm of Tooze, Peterson, Marshall, and Shenker to represent them in administrative proceedings on Colstrip 3 and 4 because of their high degree of expertise and experience in such proceedings and their familiarity with complex state and federal environmental statutes.
12/5/74	The Montana State Building and Construction Trades, all construction unions in the state, has endorsed the building of Colstrip 3 and 4, provided they comply with the environmental laws of Montana.
12/11/74	Part of a 2000 page study released by the DNRC shows that 52% of the 423 persons responding to a statewide survey oppose the construction of Colstrip 3 and 4. 59.6% said

Date	Event
	the plants were aceptable only if strong environmental safeguards are provided. 65.6% said they would object to living in an area where coal-burning plants are operated and 60.6% favor the shipping of coal as opposed to electricity.
1/4/75	A Montana Fish and Game Department biologist says Colstrip 3 and 4 will probably have no bad effects on Yellowstone River fish, and that persons predicting damage probably misinterpreted the departments report.
1/5/75	A revised public opinion survey supports the DNRC's previous conclusion that Montana residents do not favor construction of Colstrip 3 and 4. The revision is a continuation of a survey contained in a summary of DNRC's preliminary Environmental Impact Statement and will be incorporated in the final statement. 53.3% of the respondents flatly oppose construction of Colstrip 3 and 4, and 69.1% are opposed when the generated electricity is to be shipped outside the state.
1/8/75	The Powell County Commissioners have endorsed Colstrip 3 and 4 noting that proposed transmission lines would cross the county and increase tax revenue. A letter supporting the resolution along with a copy of the resolution was sent to the DNRC.
1/9/75	The Lake County Commission has refused to sign a resolution favoring the construction of Colstrip 3 and 4 which was urged by MPC officials. Montana's five newly installed Public Service Commissioners have gone on record in opposition to Colstrip 3 and 4. In a letter to the DNRC the commissioners urged the DNRC to refuse the MPC Consortium permission to build Colstrip 3 and 4 and also issued a press release to the same effect.
1/10/75	The Silver Bow County Commission has gone on record favoring Colstrip 3 and 4.
1/13/75	More than 3,000 University of Montana students signed petitions opposing the construction of Colstrip 3 and 4. The petitions were presented to the DNRC at a public hearing on the proposed facility in Missoula. A spokesman said that this disproves the MPC portrayal of young people favoring Colstrip 3 and 4 for economic reasons. This was the last of 18 meetings held across the state by the DNRC for public input for DNRC's recommendation on the proposed facility.

Date	Event
1/13/75	The NPRC has questioned the motivation of Montana attorney Patrick McDonough's suit to disqualify the Portland, Oregon law firm of Tooze, Peterson, Marshall and Shenker from representing the DNRC in administrative hearings, saying that McDonough has exploration permits on 28,000 acres of coal land, and is affiliated with American Electric Power Company.
1/15/75	The NPRC has asked the Montana Lands Board to oppose Colstrip 3 and 4 on the legal grounds that air pollution from the facilities will make successful reclamation impossible.
1/18/75	The MPC has filed a 43 page written rebuttal with an 80 page appendix containing public comments by utility officials and others to what it termed "errors, omissions and misleading statements," in the state's draft Environmental Impact Statement on Colstrip 3 and 4. The document was filed January 9, 1975 to meet the deadline for public comments on the project.
1/25/75	The Yellowstone Valley Medical Society has passed a resolution opposing Colstrip 3 and 4.
1/25/75	The DNRC has recommended in their final Environmental Impact Statement on Colstrip 3 and 4, that the state prohibit construction. The statement now goes to the BNR which is not bound by the recommendation and which most schedule hearings on the matter within 60 days.
1/28/75	A utility company spokesman has announced that the power consortium will fight the DNRC's adverse recommendation on Colstrip 3 and 4 "to the bitter end," and that they will try to convince the BNR that they can meet environmental requirements.
2/5/75	The BNR will meet tomorrow to set a starting date for hearings on Colstrip 3 and 4. Last week the DNRC recommended that the BNR deny the power company's request to build. The hearings will differ considerably from the 18 public hearings on the issue conducted across the state last year and early this year. The DNRC conducted the earlier hearings to provide information to the public and to gather comments about its draft Environmental Impact Statement. The BNR hearings are to be highly technical in nature.
2/7/75	BNR hearings on Colstrip 3 and 4 are to begin March 10, 1975 in Bozeman. Joseph Sabol, Chairman of the BNR, will serve as hearings examiner.

Date	Event
3/4/75	MPC officials told a Helena luncheon gathering for media personnel that Montana officials will not turn down the MPC's application for permission to build Colstrip 3 and 4.
3/4/75	BNR's Chairman, Joseph Sabol, defended his appointment as BNR's hearings officer for Colstrip 3 and 4 saying nothing was improper in his appointment.
3/6/75	Late motions filed by the DNRC, the NPRC, the Northern Cheyenne Indian Tribe (NCIT) and the Environmental Defense Fund indicate that they do not want final BNR hearings on Colstrip 3 and 4 to be held in Bozeman on March 10. Other motions were made that the Chairman of the BNR, Joseph Sabol, be disqualified as hearings officer, and that MPC be subpoenaed requesting it to supply further documents to the NCIT.
3/6/75	An official of the Rosebud Protective Association charged that the MPC is trying to decide the fate of Colstrip 3 and 4 in the press and to thwart the legal process.
3/9/75	Public hearings on Colstrip 3 and 4 began in Bozeman before the BNR with Board Chairman Joseph Sabol as hearings officer.
3/10/75	Wrangling during BNR hearings led to the resignation of BNR Chairman Joseph Sabol as hearings officer and to the postponement of the hearings until April 21, 1975. Sabol got Board approval to offer the hearings officer position to Bozeman attorney H. B. Landoe.
3/12/75	NCIT attorney Peter Meloy challenged the BNR's choice for hearings officer, and asked to disqualify H. B. Landoe as BNR hearings officer for having ties with the MPC and BNR Chairman Joseph Sabol.
3/13/75	Bozeman attorney H. B. Landoe said he has no intention of withdrawing as hearings officer for BNR hearings on Colstrip 3 and 4 unless the BNR wants him to.
3/13/75	NPRC and the NCIT have asked the BNR to censure and fine MPC for statements made by MPC officials at a luncheon in Helena March 4, 1975, concerning Colstrip 3 and 4. The motion said releasing information concerning a pending hearing to the general public in such a manner is likely to influence public opinion and affect the "issue" outside the record. This freedom of speech issue is of potentially major impact.

Date	Event
3/15/75	Chairman Joseph Sabol of the BNR says he is preparing a list of potential hearing examiners for hearings on Colstrip 3 and 4 should the Board accede to objections to H. B. Landoe as hearings officer.
3/19/75	Chairman of BNR, Joseph Sabol, said H. B. Landoe is no longer being seriously considered as hearings examiner due to opposition, but that the BNR is looking at other candidates.
3/19/75	The Economic Development Association of Eastern Montana announced that it will join the NPRC in opposing Colstrip 3 and 4.
3/25/75	The BNR is circulating the names of 4 lawyers, Carl Davis of Dillon, Eugene Brown of Bozeman, Calvin Colton of Billings, Randall Swanberg of Great Falls, as potential hearings officer for BNR hearings on Colstrip 3 and 4.
3/28/75	BNR announced it has tentatively designated Eugene Brown of Bozeman to preside over BNR hearings on Colstrip 3 and 4. The NPRC and NCIT said they may object to Brown, a former employee of the law firm of H. B. Landoe who withdrew as hearings officer earlier this month after objections from opponents of Colstrip 3 and 4.
4/7/75	The Montana League of Women Voters has announced plans to actively oppose construction of Colstrip 3 and 4.
4/8/75	Dillon attorney Carl M. Davis will serve as hearings officer for the delayed BNR hearing on Colstrip 3 and 4 subject to final approval by the BNR which has tentatively scheduled hearings for April 21, 1975.
4/10/75	Carl Davis was confirmed by BNR as hearings examiner to preside over BNR hearings on Colstrip 3 and 4.
4/12/75	The Environmental Sciences Division of DH has said it cannot certify that Colstrip 3 and 4 would not violate federal and state air-quality standards after running through its computers the data supplied to DH by MPC.
4/12/75	Carl Davis said the future of BNR hearings on Colstrip 3 and 4 is now uncertain due to DH saying it cannot certify that Colstrip 3 and 4 would not violate air-quality standards.
4/12/75	District Court Judge, Gordon Bennett, denied the request of Billings attorney, Patrick McDonough, seeking to evict 3 Oregon lawyers hired by the DNRC for their legal expertise

Date	Event
	in environmental and utility-siting matters. The first suit was filed in January and then dismissed at McDonough's request when the contract between the DNRC and the Oregon firm was voided. McDonough then filed a new suit against Helena attorney Robert Cummins when he recontracted the firm under the same terms as the formerly voided agreement. McDonough contended the lawyers were practicing illegally in Montana because they had not been commissioned by the Attorney General.
4/15/75	Hearings officer Davis said he plans to begin BNR hearings on Colstrip 3 and 4 on the scheduled date of April 21, 1975, despite contentions by the DNRC that it needs more time to prepare.
4/16/75	MPC is seeking a hearing before the BH, the supervisory agency of the DH, concerning the DH's announcement last week that it cannot certify that Colstrip 3 and 4 will not violate air-quality standards, and that its decision is non-reviewable. MPC says it will appeal in the courts if unable to present its case to the BH.
4/16/75	The United Transportation Union (UTU) and the Brotherhood of Locomotive Engineers, railroad unions, sent letters to the DNRC and BNR stating their opposition to Colstrip 3 and 4. The International Brotherhood of Electrical Workers (IBEW) and unions representing building trades support Colstrip 3 and 4 with the exception of IBEW local #408 of Missoula.
4/16/75	Montana's BH announced that the power consortium seeking to build Colstrip 3 and 4 must apply under the State's Clean Air Act for a construction permit for the facility, and said any certificate issued under the Utility Siting Act cannot be construed as a permit of approval under the Clean Air Act.
4/18/75	District Court Judge Bennett ordered a halt to hearings by the BNR scheduled to begin April 21, 1975 on a motion by the NPRC claiming MPC didn't file proper applications with the DH and that the BH issued a certificate on water quality without holding a proper hearing.
4/19/75	BNR hearing examiner, Carl Davis, said the BNR hearings scheduled for April 21, 1975 will be postponed until May 5, 1975 due to District Court Judge Bennett's blocking of the hearings on a motion by NPRC that the MPC had overlooked due process by failing to file an application with the DH as well as DNRC.

Date	Event
4/24/75	BH has scheduled an emergency meeting to try to work out questions on health jurisdiction with the DH on hearings for Colstrip 3 and 4, the same day the District Court Judge Bennett is to rule on the issue.
4/28/75	Governor Tom Judge has issued a surprise statement supporting the DH's contention that it has the final say in certifying proposed Colstrip 3 and 4 plants. District Court in Helena is expected to issue a ruling clarifying the roles of the DH and BH.
4/29/75	District Court Judge Bennett has rejected the contention of DH that they should be the final governmental agency to decide if Colstrip 3 and 4 would meet legal regulations for air and water pollution, and ordered the BH to conduct public hearings on health matters critical to the future of the complex. Bennett said the hearing should be held on air and water quality questions in order to give the parties due process. The citizen BH is judicial in nature and has the qualifications for similar quasi-judicial boards which must hold a hearing if one is requested by any party to the utility siting proceeding. The BNR and BH have decided to have Carl M. Davis act as joint hearing examiner for the BNR and the BH with matters relating to air and water quality to be considered first with testimony going to both state boards. Then the BNR will consider separately whether the plants are needed. The joint hearing washes out the scheduled May 5, 1975 date for BNR hearings. The order by Bennett voids the previous injunction he issued stopping the BNR from beginning its hearing and also voids a temporary order he issued requiring the power companies to make formal application to the DH for the 2 plants.
4/30/75	DH does not plan to appeal the District Court ruling directing the BH not DH to determine if Colstrip 3 and 4 will meet air and water pollution standards.
5/2/75	The executive board of the rural electric companies' statewide association, the Montana Associated Utilities (MAU), adopted a resolution calling for immediate approval of Colstrip 3 and 4.
5/3/75	Dr. S. L. Groff, director of the Montana Bureau of Mines and Geology, endorsed the construction of Colstrip 3 and 4 and the supporting transmission line.

Date	Event
5/3/75	NCIT plans to ask that scheduled hearings on Colstrip 3 and 4 be delayed until state authorities determine if the plants will meet clean-air regulations. NCIT will make the motion when the DNR begins hearings.
5/5/75	Carl M. Davis, hearings examiner, ordered BNR hearings to begin May 20, 1975 and BH and BNR joint hearings to begin June 5, 1975 on air and water quality considerations. NPRC and the NCIT oppose any kind of joint hearings.
5/12/75	NCIT has petitioned District Court to prohibit BNR from holding hearings on Colstrip 3 and 4 until BH conducts its hearings to determine if facilities would not violate state air and water quality standards. The petition contends BNR is without jurisdiction to proceed with the BH in a joint hearing on air and water quality.
5/15/75	Under a new permit system for use of navigable waters in the nation, including the Yellowstone and Missouri Rivers, effective April 30, 1975, any use of water from these rivers will require Army Corps of Engineers approval. The Corps must find any project in the best interests of the public or the project can be stopped or modified. This will apply to Colstrip 3 and 4, so the Corps may have final say on the projects.
5/16/75	BNR has decided to go ahead with scheduled hearings on Colstrip 3 and 4 even though they could be reversed by a court decision.
5/19/75	District Court Judge Bennett declined to block BNR hearings on Colstrip 3 and 4 as petitioned by NCIT who were joined by NPRC and DNRC, saying the petitioners had failed to demonstrate that BNR had exceeded its authority in scheduling the hearings and also expressed doubt whether the court had jurisdiction over the matter; however, he cautioned against the BNR and BH holding joint hearings on air and water matters.
6/5/75	BH hearing opened to determine if Colstrip 3 and 4 can meet regulations controlling air and water quality. These hearings follow BNR hearings began May 20, 1975, which were recessed to determine if the facility meets air and water pollution regulations. Hearing Officer Davis ruled that a tighter set of evidence rules-those used in the court systems-will apply to these hearings.

Date	Event
6/26/75	Carl Davis, hearing examiner in BH hearings on Colstrip 3 and 4 currently in their 26th day, ordered future witnesses to be required to present their direct testimony in written narrative form.
7/22/75	MPC consortium rested its case in BH hearings on Colstrip 3 and 4. Opponents of 3 and 4 have moved to dismiss the hearing on the grounds that the consortium failed to prove that Colstrip 3 and 4 would meet state and federal air and water quality standards.
7/23/75	In a conference call the BH decided to postpone a decision on dismissal of its hearings and ruled that the hearings will continue until the BH has a chance to review the applicants' case. Opponents of the project went to District Court and secured an order from Judge Nat Allen stopping the hearings.
7/24/75	Utility company lawyers have appealed to the Supreme Court to overrule Judge Allen's order yesterday stopping BH hearings on Colstrip 3 and 4. The Supreme Court has ordered all parties to appear at a hearing July 28, 1975.
7/27/75	The Montana Supreme Court has set aside a District Court ruling halting BH hearings concerning Colstrip 3 and 4, and has ordered the hearings to resume immediately.
7/28/75	BH has resumed hearings on Colstrip 3 and 4 under a Montana Supreme Court order.
8/13/75	DNRC has acknowledged that the state has overspent by $150,000 the $1.2 million in fees by the applicant utilities seeking to construct Colstrip 3 and 4. A spokesman for DNRC said that the hearing process will be completed however.
11/17/75	The BH must determine if it can impose conditions to be met if they give a preliminary okay to Colstrip 3 and 4.
11/21/75	The state BH voted 5-1 to conditionally certify construction for Colstrip 3 and 4. The BNR must now decide if the facility is needed by the public and if it would be compatible with the environment. The BH said it will monitor units 1 and 2, and if they violate pollution control standards, certification of units 3 and 4 will be suspended pending modification of all units. There are also restrictions on withdrawing water from the Yellowstone River when the flow at a stipulated location is below

Date	Event
	a certain level, and on the type of coal the plants will be allowed to burn.
12/5/75	BNR hearings on Colstrip 3 and 4 will resume January 19, 1976.
12/30/75	DNRC has released its impact statement with the finding that Colstrip 3 and 4's use of the Yellowstone River could have a detrimental effect on fish in the lower Yellowstone area, and that reduced flow could change natural physical and chemical features of the river.
12/30/75	The U.S. Interior Department's Office of Mineral Policy Development released a study finding that Colstrip 3 and 4 would lead to prosperity for the area.
1/18/76	BNR hearings on Colstrip 3 and 4 will begin again today after a 7 month lapse for BH hearings on air and water quality standards.
1/23/76	The Rosebud Protective Association says wastes from Colstrip generating plants pose severe threats to underground water resources in southeastern Montana. The association said the utilities said the cooling water storage pond was sealed and wouldn't leak, and then began leaking 600 gallons a minute. The association said the BH was not doing its job properly.
1/28/76	Montana's United Transportation Union (UTU), a member of the states AFL-CIO which supports Colstrip 3 and 4, has released an official letter underscoring its nuetrality in the controversy.
2/11/76	A spokesman for the International Union of Operating Engineers says the union is supporting Colstrip 3 and 4.
3/4/76	NCIT council, the governing body of the reservation, made formal a declaration that the NCIT opposes construction of Colstrip 3 and 4.
3/10/76	BNR's 10 month old hearing on Colstrip 3 and 4 was recessed with a 1 day session scheduled for next week to hear witnesses unable to appear as previously scheduled, and which will be the last day for public witnesses to testify. The hearing will then recess to the following week when the utilities will begin presenting rebuttal witnesses.

Date	Event
3/22/76	BNR hearings on Colstrip 3 and 4 have moved into the rebuttal stage in the hearings 44th day since they resumed May 20, 1975.
3/30/76	Testimony on Colstrip 3 and 4 before BNR ended after 104 days. Closing arguments remain. 304 persons testified at the BH and BNR hearings although the total is somewhat less since some persons testified at both hearings. Of the 132 public witnesses at the BNR hearings, 62 supported and 70 opposed Colstrip 3 and 4.
4/16/76	BNR set May 19th and 20th, 1976 for hearing closing arguments on whether to permit construction of Colstrip 3 and 4.
4/27/76	Utilities, state agencies, and other groups have spent at least $3.2 million in proceedings so far to determine whether to build Colstrip 3 and 4 which the utilities sought permission to build in June 1973.
6/25/76	BNR has given conditional approval, by a 4-3 vote, to the construction of Colstrip 3 and 4. BNR attatched 14 conditions to their approval including giving electrical co-operatives the opportunity to participate in ownership, require the utilities to operate water-gauging and air-quality monitoring stations at their own expense in co-operation with the BH, require the contractor (Bechtel Power Corporation) to work with the NCIT to set up a program to train members in the construction and operation of the plant, and specifying that construction guidelines minimize environmental damage and that final approval of the transmission line rest with the BNR.
7/15/76	NPRC and the Northern Rockies Action Group have asked the BNR to reconsider its approval last month of Colstrip 3 and 4. NPRC is also seeking a re-hearing on 3 alleged legal errors; 1) Power companies withheld information from BNR and BH which conditionally certified that Colstrip 3 and 4 meet state and federal air and water quality standards, 2) BNR issued their decision before preparing findings of fact, 3) that conditions adopted by BNR are "nebulous and unclear."
7/20/76	BNR has called a special meeting to reconsider its decision approving Colstrip 3 and 4 amidst claims that Board member Clark be disqualified from voting due to an alleged improper conversation outside the hearings with an official of the MPC.

Date	Event
7/22/76	BNR has rejected the disqualification of Board member Clark, refused to reopen hearings, and has voted 4-3 to give final approval to Colstrip 3 and 4.
8/20/76	The NPRC and NCIT have appealed to District Court in the first Judicial District in Lewis and Clark County the state's decision to authorize construction of Colstrip 3 and 4. No hearing date was set by District Judge Gordon R. Bennett. NPRC and NCIT charge that the BH and BNR made substantial errors in granting conditional certification.
8/21/76	The MPC told BH during hearings on Colstrip 3 and 4 that the facility would meet Environmental Protection Agency (EPA) standards for Prevention of Significant Deterioration (PSD) in air quality, and at the same time was applying to the EPA that the June 1, 1975 PSD regulation didn't apply to MPC because construction on Colstrip 3 and 4 had already commenced. The EPA told MPC informally in January and again in May, that it believes Colstrip 3 and 4 must comply with PSD standards. On July 1, 1976 the utilities formally asked the EPA to reconsider. MPC has covered its bet by also applying for a new source permit for Colstrip 3 and 4. During the same period the NCIT was moving in May to have their reservation declared a Class I clean air category, following establishment of classes by the EPA. The NCIT is the first to apply for the Class I designation which came from a 1973 United States Supreme Court ruling (4-4) upholding a lower court decision telling the EPA it would be illegal to allow new polluters to come into an area with clean air and pollute up to the federal standards.
9/8/76	Figures compiled by the DNRC show that the hearing on Colstrip 3 and 4 cost more than $1.5 million.
9/15/76	MPC has asked that an appeal by NPRC and NCIT in District Court be dismissed because all parties were not informed of it properly, and also denied the majority of reasons listed as the basis for the appeal.
10/15/76	MPC consortium has filed a $1 billion suit against the EPA over upgrading air-quality standards that Colstrip 3 and 4 would have to meet. The EPA applied Class I standards to sulfur-dioxide emissions from the plant for PSD regulations. The utilities asked the District Court in Billings to rule that they had made binding commitments to build the facility before the EPA adopted the PSD

Date	Event
	regulations on June 1, 1975. The EPA action apparently came from the NCIT's request that their reservation be designated a Class I air-quality area.
11/4/76	Twenty rural electric co-operative are negotiating to buy a 7% share of Colstrip generating plants 3 and 4, the BNR was informed. This was one of the conditions set by the BNR when it issued the permit to build the plants.
3/31/77	NPRC and NCIT have filed notice that they will appeal a ruling by U.S. District Court Judge James Battin that proposed Colstrip 3 and 4 plants do not need a preconstruction permit from the EPA in U.S Appeals Court. Battin's decision made final his ruling of January 27, 1977 that the power consortium had "commenced construction" on the facility on or before June 1, 1975 and was therefore exempt from preconstruction review under the EPA's PSD regulations on air quality.
4/15/77	Presidents of the five partners in the consortium to build Colstrip 3 and 4 decided not to begin construction on the project. NPRC is appealing U.S. District Court Judge Battin's decision that the project does not require preconstruction review by the EPA. EPA has not decided if it will join in the suit.
6/27/77	BH has set October 15, 1977 as a deadline for submitting final certification reports on equipment used to monitor air pollution from Colstrip 1 and 2, whose satisfactory performance was a condition set for approval of Colstrip 3 and 4.
6/28/77	District Court Judge Bennett has set a hearing for July 11, 1977 on a motion by NPRC and NCIT to halt construction on Colstrip 3 and 4 pending an appeal of the BNR's decision approving construction of the facility.
7/11/77	District Court Judge Bennett has refused to halt construction of Colstrip 3 and 4 pending the outcome of a suit filed by NPRC challenging the action of the BNR authorizing construction of the plants. The NPRC and NCIT have also filed suits in federal court seeking to halt construction.
3/5/78	District Court Judge Bennett issued an order today halting construction of Colstrip 3 and 4. The action on

Date	Event
	suit by NPRC and NCIT against the BNR and BH said that BH hearings failed to provide cross-examination of witnesses to the petitioners, and also failed to consider the state's implementation plan for the project. Bennett also held that a conditional approval by either Board is not allowable. Bennett said the BNR is required under Montana's Utility Siting Act to find that the facility represents "minimum adverse environmental impact" considering the state of technology, and the nature and economics of alternatives. Bennett also ordered findings and conclusions in matters not adequately treated at earlier hearings.
3/10/78	John Orth, director of the DNRC, urged the BNR to begin rehearings on Colstrip 3 and 4 without waiting for further court action following District Court Judge Bennett's overturning of BNR approval for the project last week. Joseph McElwain, President of the MPC, said the decision will be appealed to the Montana Supreme Court.
3/12/78	The BH has voted to join the BNR and the consortium of 5 power companies to appeal the District Court decision blocking construction of Colstrip 3 and 4.
3/25/78	Leo Graybill, Jr., attorney for the NPRC, said MPC's request to speed up the appeal involving Colstrip 3 and 4 is a "sham" and an "affront to the dignity of the Montana Supreme Court." MPC cited financial reasons in seeking to shorten normal court deadlines for filing legal briefs and advancing the appeal on the court calendar. The Supreme Court has scheduled a hearing for Tuesday.
3/29/78	The Montana Supreme Court heard arguments on a motion by power companies, some state agencies, and a number of labor and industrial organizations that a District Court order halting construction of Colstrip 3 and 4 be stayed pending full appeal.

APPENDIX B

Suggested Chronology for Siting Process

Time	Step
Day 1	Notice of intent to file. DNRC, DHES, and PSC studies begin. Information gathering hearings are held.
Day 90	Formal application filed. Studies and hearings continue.
Day 360	Need study concludes with report.
Day 450	PSC "paper hearing" on need question begins.
Day 540	PSC decision on need. No judicial review because PSC action cannot preclude second step in siting process.
Day 640	DNRC and DHES studies conclude with reports.
Day 730	Joint BNRC and BHES pre-hearing proceedings.
Day 790	Joint BNRC and BHES "paper" hearing.
Day 910	BHES decision. Judicial review lies only after adverse decision concerning state and federal air and water quality standards and plans.
Day 1000	BNRC decision after BHES certification of air and water quality. Judicial review lies after decision.

APPENDIX C

Suggested "Paper Hearing" Procedure

Sequence	Activity
Step 1	Notice of intention to file an application.
Step 2	Application filed.
Step 3	Agency appoints a hearing examiner.
Step 4	Hearing examiner calls for all testimony that will bear upon the agency decision, including governmental reports. This direct evidence will be submitted in writing, unless good reason requires oral testimony.
Step 5	Hearing examiner and parties study testimony before pre-hearing conference.
Step 6	Hearing examiner takes official notice of facts and provides opportunity for adverse argument in writing.
Step 7	Hearing examiner receives written arguments to assist in specifying issues and organizing the hearing.
Step 8	Pre-hearing conference held to clarify issues, stipulate agreements concerning certain matters, and identify issues actually in dispute. Hearing dates and procedures are set.
Step 9	Exchange of documents and written arguments on specified issues. Oral argument allowed only if necessary.
Step 10	Hearing examiner presents to agency a complete record and proposed findings, conclusions, and decision.
Step 11	Agency studies all testimony, argument, and documents.
Step 12	Agency proposes a decision. Decision includes factual and methodological bases, legal interpretations, and policy considerations.
Step 13	Agency receives written comment on proposed decision (oral comment allowed only if necessary), thus permitting meaningful criticism of significant aspects of proposed decision.
Step 14	Agency issues final decision. Final decision includes detailed response to criticism and contrary evidence brought forward by parties opposing proposed agency decision. The record also consists of detailed articulation of findings of fact, interpretations of law, methods used to obtain and analyze data, policy considerations underlying decision, and other grounds and reasons for the decision.

Sequence	Activity
Step 15	Agency keeps record open for 30 days after final decision in order to permit rebuttal and supplementary evidence to be included.
Step 16	Record for judicial review includes technical documents; written testimony; transcripts of oral comment and testimony (if any); contentions, evidence, criticism, and response of parties and agency; and conclusions, findings, reasons, and grounds of the agency's decision. Court reviews the record for agency adherence to due process and substantial evidence standards and to insure that the agency action was not arbitrary or capricious.

APPENDIX D

Suggested Language for "Paper Hearing" Procedure

1. Determination of Parties. (a) The applicant and the DNRC shall be the initial parties to any proceeding.

(b) Other persons may, at the discretion of the hearing examiner, be granted the right to participate as parties if it is determined that the final decision could directly and adversely affect them or the group they represent, and that they may contribute materially to the disposition of the proceedings.

(c) Any person wishing to participate in the proceeding as a party under paragraph (b) of this section shall submit a petition to the hearing examiner within a reasonable time after the notice of such hearing has been served. The petition should be filed with the hearing officer, the applicant, the Director of DNRC, and any other person who is a party at the time of the filing. Such petition shall concisely state: 1) the petitioner's interest in the proceeding, 2) how his participation as a party will contribute materially to the disposition of the proceeding, 3) who will appear for the petitioner, and 4) the issues on which petitioner wished to participate.

(d) The hearing officer shall promptly ascertain whether there are objections to the petition. He shall then determine whether petitioner is qualified to be a party in the proceedings, as defined in paragraph (b) of this section, and permit or deny participation accordingly.

2. Notice of Hearing Requirement. Whenever a hearing is required under the Siting Act, the BNRC shall serve on the applicant a notice of such requirement by registered mail, return receipt requested, to applicant's last known address. Such notice shall contain a statement or citation of the legal authority under which the proceedings are to be held. Notice of the hearing requirement shall also be published in the Montana Administrative Register and in the legal notices section of the major state newspapers.

3. Hearing Examiner. Each pre-hearing conference and hearing shall be held before a hearing examiner designated by BNRC and BHES.

4. Authority and Responsibilities of Hearing Examiner. (a) The hearing examiner shall have all powers necessary to preside over the parties and the proceedings, conduct the hearing, and enter recommended findings of fact and conclusions of law and a recommended determination of the issue on the basis of the record before him.

(b) His powers shall include, but not be limited to, the power to:

1) hold conferences to settle, simplify, or fix the issues involved, or to consider other matters that may aid in the expeditious disposition of the proceedings;

2) require parties at any point in the proceedings after his appointment to submit in writing all direct evidence that will bear upon the

ultimate decision, unless oral testimony is determined essential;

3) establish rules for media coverage of the proceedings;

4) rule on motions and other procedural items;

5) regulate the course of the hearing and the conduct of counsel, parties, witnesses, and other participants;

6) administer oaths and affirmations, and direct witnesses to testify;

7) receive, rule on, exclude or limit evidence;

8) fix time limits for submission of written documents in matters before him;

9) take official notice of facts and provide opportunity for adverse argument in writing;

10) take any action authorized by these provisions or other regulations under applicable law.

5. Discovery. (a) Methods- Parties, at the discretion and direction of the hearing examiner, may use discovery as provided in these rules by deposition, written interrogatories, production of documents, or other items; or by permission to enter property for inspection and other purposes.

(b) Scope- Discovery may pertain to any matter, not privileged, which is relevant to the subject matter involved in the hearing.

(c) Protective Orders- Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the hearing examiner may make an order, which justice requires, to limit or condition discovery in order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense.

(d) Sequence and Timing- Methods of discovery may be used in any sequence authorized by the hearing examiner. The fact that a party is conducting discovery shall not operate to delay any other party's discovery.

(e) Time Limit- Discovery by all parties will be completed within such time as the hearing examiner directs.

5. Admissions as to Facts and Documents. Prior to the date of the hearing, the hearing examiner may on the motion of any party serve upon any other party a written request for the admission of the genuineness and authenticity of any relevant documents described in, and exhibited with, the request, or for the admission of the truth of any relevant matters of fact stated in the request. Each

matter as to which an admission is requested shall be deemed admitted unless within a period of 20 days the party to whom the request is directed serves upon the hearing examiner and requesting party a statement either (a) denying specifically the matters as to which an admission is requested, or (c) setting forth in detail the reasons why he cannot truthfully either admit or deny such matters.

7. Interrogatories to Parties. (a) Any party, at the discretion and direction of the hearing examiner, may serve upon any other party written interrogatories.

(b) Each interrogatory shall be answered separately and fully in writing under oath, unless it is objected to, in which event the objection shall be stated in lieu of an answer. The answers are to be signed by the person making them, and the objections signed by the attorney or other representative making them. Answers and objections shall be made within time limits set by the hearing examiner.

(c) Interrogatories may relate to any matter not privileged which is relevant to the subject matter of the hearing.

8. Production of Documents and Things and Entry upon Land for Inspection and Other Purposes. (a) Any party, at the discretion and direction of the hearing examiner, may serve on any other party a request to produce and permit the first party, or someone acting on his behalf, to inspect any copy, designated documents, records, or other data compilations from which information can be obtained and which are in the possession, custody, or control of the party upon whom the request is served. If necessary, translation of data compilations shall be done by the party furnishing the information.

(b) Any party, at the discretion and direction of the hearing examiner, may serve on any other party a request to permit entry upon designated property in the possession or control of the latter party for the purpose of inspecting, measuring, surveying, photographing, testing, or sampling the property or any designated object.

(c) Each request shall set forth with reasonable particularity the items to be inspected and shall specify a reasonable time, place, and manner of making the inspection and performing the related acts.

(d) The party upon whom the request is served shall respond within a time limit set by the hearing examiner. The response shall state, with respect to each item, that inspection and related activities will be permitted as requested unless there are objections, in which case the reason for each objection shall be stated.

9. Prehearing Conferences. (a) After the return notice of hearing

requirement has been filed by the applicant and arguments on issues and procedures have been received by the hearing examiner, the hearing examiner will establish a prehearing conference date for all parties including persons whose petition requesting party status has not been ruled upon. Written notice of the prehearing conference shall be sent by the hearing examiner.

(b) At the prehearing conference the following matters, among others, shall be considered: 1) identifications, simplification, and delineation of the issues to be heard; 2) stipulations; 3) limitation on the use of witnesses and on the number of witnesses to be heard on any issue, if witnesses are to be used; 4) exchange of witness lists; 5) procedures applicable to the proceeding; 6) dates of the hearing; 7) scheduling of the dates for exchange of documents and arguments. Additional prehearing conferences may be scheduled at the discretion of the hearing examiner upon his own motion or the motion of a party.

(c) The hearing examiner shall serve on all parties a notice of hearing by registered mail, return receipt requested, to parties' last known address. Such notice shall contain the place (if applicable) and dates of the hearing, reference to the legal authority under which the hearing is to be held, and a concise statement of the issues to be considered by the hearing. Notice of the hearing, also, shall be published in the Montana Administrative Register and in the legal notices section of the major state newspapers. Notice shall be given at least 30 days prior to the commencement of the hearing.

10. Hearing. The hearing is directed primarily to the exchange and filing of written argument related to the issues in the proceeding. Oral presentation and cross-examination shall be allowed at the discretion and direction of the hearing examiner, and only if good and sufficient reason is present.

11. Evidence. Formal rules of evidence will not apply to the proceeding. Irrelevant, immaterial, unreliable, and unduly repetitious evidence will be excluded from the record of a hearing.

12. Testimony. All testimony shall be prepared in advance in writing and shall be submitted to the hearing examiner prior to the commencement of the hearing. Testimony at the hearing shall be under oath by all witnesses. Witnesses shall not be subject to oral cross-examination unless it is required within the discretion of the hearing examiner. There shall be within the discretion of the hearing examiner the opportunity for oral presentation of testimony if effective written presentation is beyond the competence of witnesses.

13. Objections. Objections to evidence presented and noticed shall be timely, and the party making them shall briefly state the ground relied upon.

14. Official Transcript. An official reporter, if required, shall be designated for all hearings. The official transcripts taken of oral testimony and argument, together with exhibits, written arguments, or memoranda of law, shall be filed with the hearing examiner. Transcripts may be obtained by the parties and the public at rates not to exceed the applicable rates fixed by the contract with the reporter. Upon notice to all parties, the hearing examiner may authorize such corrections to the transcript as are necessary to reflect accurately the testimony.

15. Public Comment. The BNRC shall establish procedures whereby the general public may submit written comments on the proposed siting, or may hold public hearings on an informal basis at which oral comments may be given. These comments shall be recorded in the BNRC report to the BNRC for inclusion in the BNRC docket, and shall be addressed in the Board's final decision. These comments, hearings, and report shall be concluded before the BNRC hearing begins.

16. Siting Decision Docket. A siting decision docket shall be established for each siting procedure. All documents that the parties feel are relevant shall be placed in the file at the time the hearing is first scheduled. All public comments received during the BNRC public comment period and all transcripts of oral presentations concerning the siting shall be placed in the file. All important issues raised in the public comments and in the written and oral arguments shall be discussed by the hearing examiner in the preamble to his recommended decision. The recommended decision along with its support documents will close the file. The contents of this docket shall be the exclusive record for judicial review.

17. Proposed Findings and Conclusions. After the close of the hearing, each party may file with the hearing examiner proposed findings of fact and conclusions of law, together with supporting briefs. Such proposals and briefs shall be served on all parties. Reply briefs may be submitted after receipt of the initial proposals and briefs. Reply briefs should be filed and served on all parties.

18. Recommended Determination. The hearing examiner shall, in an expeditious manner, rule on proposed findings and conclusions submitted by the parties and shall make to BNRC and BHES recommended findings, conclusions, and a decision. The determination of the hearing examiner shall respond to criticism and contrary evidence. He shall set forth the steps in his reasoning and the factual basis for his recommendations. The BNRC and BHES may affirm, modify, or set aside in whole or in part the recommended findings, conclusions, and decision of the hearing examiner.

19. Record for Decision. The hearing examiner will make his recommended findings, conclusions, and recommended decision upon the basis of the record before him. The docket up to the point of his findings and decision shall be the record for his decision.

20. Proposed Decision. The BNRC shall propose a decision which shall include factual and methodological bases, legal interpretations, and policy considerations. The Board shall request parties to submit written comments on the proposed decision.

21. Final Decision. The BNRC in its final decision shall respond to the criticism and contrary evidence contained within the docket. The Board shall set forth the methods and steps in its reasoning, the factual basis upon which the decision is made, interpretations of law and policy considerations underlying the decision, and other grounds and reasons for the decision. This final decision is subject to judicial review by the District Court, upon appeal by any adversely affected party.

22. Record for Judicial Review. The BNRC shall keep the record open for 30 days after final decision in order to allow written rebuttal and supplementary evidence to be included. The record for judicial review shall include, in addition to the final rebuttal and supplementary evidence, the following materials: technical documents; written testimony; transcripts of oral comment and testimony (if any); contentions, evidence, criticism, and response of parties and Boards; and conclusions, findings, reasons, and grounds of the final decision.